

Before the  
**Federal Communications Commission**  
 Washington, D.C. 20554

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 FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF SECRETARY

In the Matter of )

Implementation of Section 309(j) of the )  
 Communications Act -- Competitive Bidding )

PP Docket No. 93-253

To: The Commission

### APPLICATION FOR REVIEW

PCS PRIMECO, L.P. ("PRIMECO")<sup>1</sup> hereby applies for Commission review of rule changes announced in an *Erratum* issued by the Chief, Wireless Telecommunications Bureau ("Bureau") in the above-captioned docket.<sup>2</sup> By this *Erratum*, the Bureau revised the Commission's unjust enrichment rules set forth at 47 C.F.R. § 24.712(d)(1)-(d)(2), as adopted in the Commission's *Fifth Memorandum Opinion and Order* in PP Docket No. 93-253 ("*Fifth MO&O*").<sup>3</sup>

In the *Fifth MO&O*, the Commission made a number of rule changes to enhance the opportunities for designated entities ("DEs") to participate in PCS by making capital more readily available to them. These rule changes provided a variety of incentives (including bidding credits) for non-DEs to make investments in DE-controlled entities, while assuring DE control during the first five years after licensure. As part of this effort, the Commission revised § 24.712(d)(1) to

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<sup>1</sup> PRIMECO is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch Communications, Inc. and U S WEST, Inc.). PRIMECO is a current bidder in the Block A/B PCS auctions.

<sup>2</sup> *Erratum*, DA 95-19 (rel. Jan. 10, 1995), *reprinted in* 60 Fed. Reg. 5333 (Jan. 27, 1995).

<sup>3</sup> 59 Fed. Reg. 63,210 (Dec. 7, 1994).

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specify that a DE-controlled entity would have to repay the amount of the bidding credit it received, to avoid “unjust enrichment,” if it assigned its license, or transferred control of the licensee, to a non-DE within the first *five years* after license grant. A corresponding change to § 24.172(d)(2) provided for partial repayment of bidding credits in the event of a sale or transfer to a DE eligible for a lesser bidding credit prior to the end of the five-year period.<sup>4</sup> The Bureau’s *Erratum*, however, has purported to change this rule by extending the period for recapture of the bidding credits to the entire 10-year license term.

PRIMECO submits that the *Erratum* is defective as a matter of law. Moreover, the *Erratum* rule changes are at odds with Congress’ objectives in the Omnibus Budget Reconciliation Act of 1993<sup>5</sup> and with Commission policies, and are contrary to the public interest. The Commission should vacate the Bureau’s action and reinstate the unjust enrichment provisions originally adopted by the Commission in the *Fifth MO&O*.<sup>6</sup>

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<sup>4</sup> Thus, the rules provided that if the license is assigned or transferred “before termination of the five-year period following the date of the initial license grant . . .” the recapture penalty would apply. 47 C.F.R. § 24.712(d)(1)-(2) (*Fifth MO&O*, App. B at xii-xiii).

<sup>5</sup> Pub. L. No. 103-66, 107 Stat. 312 (1993).

<sup>6</sup> This application for review is timely filed. The *Erratum* was released January 10, 1995 and was published in the Federal Register on January 27, 1995; this application for review is being filed within 30 days of publication, as required by 47 C.F.R. § 1.115(d). Any action taken by the staff pursuant to delegated authority is subject to an application for review. See 47 U.S.C. § 155(c)(4) (an aggrieved party may file an application for review of any “order, decision, report, or action made or taken” pursuant to delegated authority); see also 47 C.F.R. § 1.115(a).

The *Erratum* cannot be viewed as dating back to the December 7, 1994 publication of the *Fifth MO&O*, because that would foreclose any opportunity for review or reconsideration of the substantive rule changes announced in the *Erratum*. Because the *Erratum* was released four days *after* the January 6, 1995 statutory deadline for petitions for reconsideration of the *Fifth MO&O*, PRIMECO and other parties aggrieved by the *Erratum* could not have addressed its legal and policy deficiencies in a timely petition for reconsideration of the *Fifth MO&O*. The Commission has long recognized that its own late issuance of an erratum provides a new opportunity for petitions for reconsideration. See *Rural Cellular Rulemaking*, CC Docket 83-388, *Order*, 2 FCC Rcd. 4451 (Mob. Ser. Div. 1987) (announcing extension of period for petitions for reconsideration due to delay

**I. THE STAFF EXCEEDED ITS DELEGATED AUTHORITY BY MAKING SUBSTANTIVE CHANGES TO RULES ADOPTED BY THE COMMISSION**

The *Erratum* should be vacated because it exceeded the staff's delegated authority. The Commission has not delegated authority to its staff to reverse or depart from rules and policies established by the Commission itself. However, this is what the staff has done in the *Erratum*. The delegations of authority to the Chief, Common Carrier Bureau and Chief, Private Radio Bureau, from which the authority of the Chief, Wireless Telecommunications Bureau is presumably derived, are clear.<sup>7</sup> With respect to rulemakings, the Chief, Common Carrier Bureau may *not* adopt notices of proposed rulemaking or reports and orders;<sup>8</sup> the Chief, Private Radio Bureau is authorized to adopt only "*nonsubstantive* revisions to the rules," clarifications of rules "based on established Commission precedent," and conforming certain rules with others, but only "*where novel questions of policy or law are not involved.*"<sup>9</sup> While the staff has authority to issue errata to Commission decisions that correct typographical or similar nonsubstantive errors, the staff does not have the

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in issuance of substantive erratum); *Further Order on Reconsideration*, 4 FCC Rcd. 5272 (1988) (addressing petitions for reconsideration addressing the delayed erratum). At a minimum, the Commission must allow a similar period for seeking review of a staff erratum to a Commission decision, particularly in light of the lack of any statutory limit on applications for review, *see* 47 U.S.C. § 155(d).

<sup>7</sup> The Commission has not yet released the "published rule or order" required by 47 U.S.C. § 155(c)(1) specifying the authority delegated to the Chief, Wireless Telecommunications Bureau. PRIMECO assumes, for present purposes, that the Commission has adopted, but not released, a delegation of authority to the Chief, Wireless Telecommunications Bureau that is the same as that previously delegated to the Chief, Common Carrier Bureau and the Chief, Private Radio Bureau, *see* 47 C.F.R. §§ 0.291, 0.331, with respect to the services that have been placed under the new Bureau's responsibility. PRIMECO also assumes, for present purposes, that the Chief, Wireless Telecommunications Bureau has been given principal staff responsibility over those portions of the current proceeding that involve PCS.

<sup>8</sup> 47 C.F.R. § 0.291(h).

<sup>9</sup> 47 C.F.R. § 0.331(a)(2) (emphasis added).

authority to make substantive revisions to Commission rules adopted pursuant to a notice and comment rule making proceeding.

It is noteworthy that the “slip opinion” version of the *Erratum* released by the Commission contained *no* explanation for the rule change; further, the Federal Register publication of the *Erratum* explained the “need for correction” as follows: “As published, the final regulations contain errors which may prove to be misleading and are in need of clarification.”<sup>10</sup> The changes to § 24.712(d) do not clarify the rule, however, they change the substance of the rule. Moreover, the rule promulgated by the Commission was not “misleading” or in need of clarification because, as adopted, it was consistent with the policies adopted in the *Fifth MO&O* and in the generic auction rules proceeding. Accordingly, the subsequent changes to § 24.712(d), set forth in the *Erratum*, should be vacated.

## **II. THERE IS NO BASIS FOR EXTENDING THE BIDDING CREDIT RECAPTURE PERIOD FROM FIVE TO TEN YEARS**

While the Commission has the power (unlike the Bureau) to substantively change the rules adopted in the *Fifth MO&O* by issuing a new notice of proposed rulemaking, or by reconsidering the rules, PRIMECO submits that extending the period for recapture of bidding credits from five to ten years for broadband PCS would be unwarranted.

The rules adopted in the *Fifth MO&O* clearly and explicitly established a five-year period for bidding credit recapture. The five-year rules were fully consistent with the Commission’s generic auction policies and rules, which established five years as the maximum duration of such

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<sup>10</sup> 60 Fed. Reg. at 5334, col. 1.

a recapture period, absent a service-specific reason for a different period.<sup>11</sup> Also, the rules, as adopted in the *Fifth MO&O*, eliminated the ambiguity resulting from the prior lack of specification of a specific recapture period in the rules.<sup>12</sup>

As amended in the *Fifth MO&O*, the rules simply incorporated the 5-year duration that was already implicitly there by virtue of the generic auction rules and decisions, eliminating any ambiguity resulting from the lack of a specific time period in the broadband PCS recapture rules. Nothing in the text of the *Fifth MO&O* suggested that the Commission intended to recapture a DE's bidding credit if the DE assigned or transferred its license after five years. The *Fifth MO&O* indicates only that bidding credits must be repaid if there is a sale to an entity entitled to less bidding credits *within the first five years*.<sup>13</sup> This is fully consistent with the rules adopted. Thus, the public had no reason to doubt the legitimacy of the five-year rule set forth in the *Fifth MO&O*.

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<sup>11</sup> In the *Second Report and Order*, PP Docket 93-253, 9 FCC Rcd. 2348 (1994), in which the Commission established the generic auction rules, the Commission said that while the recapture period could vary from service to service, "[i]n no event will recapture provisions apply to the transfer or assignment of a license that has been held for more than five years." *Id.* at ¶ 262; *see also id.* at App. B, § 1.2111(b)(1). On reconsideration, in its *Second Memorandum Opinion and Order*, PP Docket 93-253, 9 FCC Rcd. 7245 (1994), the Commission reiterated that this had been its policy, *id.* at ¶ 122, but it said it needed the flexibility to establish a longer recapture period on a service-specific basis, should circumstances warrant, *Id.* at ¶ 123. Thus, the generic rule was modified to make five years the standard, "*unless otherwise specified.*" *Id.* at App. B, § 1.2111(b)(1) (emphasis added). The Commission found no reason to deviate from the five year rule for narrowband PCS. *See* 47 C.F.R. § 24.309(f).

<sup>12</sup> The rules adopted in the *Fifth Report and Order* did not specify a particular duration for the recapture period, *see Fifth Report and Order*, 59 Fed. Reg. 37,566 (July 22, 1994), at App. B, § 24.712(d), and that decision did not provide any service-specific rationale for deviating from the generic 5-year policy. The ambiguity was created in the text of the *Fifth Report and Order*, however, where the Commission described the recapture period as being the entire license term, even though the generic auction rules had made clear that the period would extend no more than five years. *Fifth Report and Order* at ¶ 141.

<sup>13</sup> *Fifth MO&O* at ¶ 127.

The public has relied on the unambiguous language of the rule set forth in the *Fifth MO&O*. From November 23, 1994 until the issuance of the *Erratum* on January 10, 1995, DEs and potential investors relied on the existence of a five-year recapture rule when negotiating the terms of possible relationships. Now, the changes to the recapture period affected by the *Erratum* have undermined the entire negotiating process.

The extension of the bidding-credit recapture period from five to ten years significantly alters the economic basis for negotiations. The Commission has never stated any reason why broadband PCS warrants a longer bidding credit recapture period, and there is no record basis for doing so now. The Bureau's rule change has already adversely impacted the financial community's willingness to invest in DE applicants. Customary equity and debt financing arrangements are based on commitments that allow for some liquidity in the medium term. Liquidity of investment is essential to commercial lenders and venture capitalists, particularly in an industry with high up-front expenses and no near-term cash flow. Potential DE applicants are thus encountering difficulties in obtaining the necessary financing as a result of the ten-year rule.

Moreover, the Commission itself has recognized that there are any number of legitimate business reasons why a DE may want or need to assign/transfer its interests in a broadband PCS license prior to the end of the ten-year license term. Based on this fact, the Commission appropriately chose to limit the mandatory holding period to five years (three years for transfers to other DEs) to balance the need to ensure that DEs retain *de facto* and *de jure* control with the need to provide the flexibility required for DEs to attract the capital necessary to create significant DE participation in PCS.<sup>14</sup> The *Erratum* undermines this important objective.

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<sup>14</sup> *Fifth R&O* at ¶ 129. The Commission has recognized that license transfer prohibitions, even for a limited time, "may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously." *Second Report and Order*, 9 FCC Rcd. at 2395.

In addition, the results of the regional narrowband PCS auctions indicate that the bidding credit effectively adds a premium to the bid price of a license in excess of the license's true market value; the amount paid after subtracting the credit comes much closer to market value.<sup>15</sup> Under these circumstances, there is no "unjust enrichment" to be recaptured -- instead, the repayment obligation is effectively a penalty imposed on the sale to a non-DE that will have the same effect as a tax on the sale. By extending the recapture period from five to ten years, the Commission will effectively make DEs unable to assign or transfer control of their licenses, for which they may have paid full market value,<sup>16</sup> except at a significant loss -- while non-DE licenses are subject to no comparable penalty.

In sum, the ten-year recapture rule makes investments in DE partnerships significantly less attractive and will reduce the capital available to DEs, thereby frustrating Congressional and Commission objectives to maximize DE PCS participation opportunities.

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<sup>15</sup> In the regional narrowband auction, DEs paid a greater net amount (after subtracting the 40% bidding credit) than non-DEs in seven of the ten markets in which DEs and non-DEs bid on comparable licenses. For example, the DE paid \$11,262,003 (after subtracting the 40% bidding credit) for the license associated with Region 02, Frequency Block 06, while the comparable non-DE license (Region 02, Frequency Block 05) was acquired for \$8,000,013. Similarly, the DE paid \$10,488,000 (after subtracting the offset) for the Region 04, Frequency Block 06 license, while the non-DE paid \$8,262,000 for the comparable license (Region 04, Frequency Block 05).

<sup>16</sup> Given that the bidder's credit functions as a premium on top of the non-DE price in the auction, as shown in the regional narrowband auctions, the net price to a DE, after subtraction of the bidding credit, is likely to represent approximately the fair market value of the license.

## **CONCLUSION**

For the foregoing reasons, PRIMECO urges the Commission to set aside the changes to § 24.712(d) announced in the *Erratum* and to restore the rules as adopted in the *Fifth MO&O*.

Respectfully submitted,

**PCS PRIMECO**

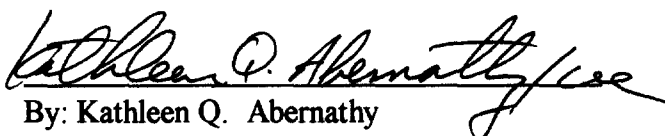
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